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TRUTH MACHINES AND CONSEQUENCES: THE LIGHT AND DARK SIDES OF 'ACCURACY' IN CRIMINAL JUSTICE

SETH F. KREIMER*

INTRODUCTION: THE TRUTH MACHINE: DNA TESTING AND ACTUAL INNOCENCE

I first encountered the issues surrounding DNA analysis in the criminal justice system a little more than three years ago, when my colleague David Rudovsky approached me with the case of Bruce Godschalk, which he had been asked to handle with the Innocence Project.¹

Bruce Godschalk, who had been convicted of two rapes in 1987, and who still denied committing the offenses, had heard of the possibilities of DNA testing. He had, through counsel, approached the office of the district attorney who had handled his case, seeking access to biological samples in both rapes. Mr. Godschalk argued that if the DNA sequence in the samples was not his, it would prove that he was innocent of the crimes for which he had been convicted. The district attorney refused to provide access to the samples, relying on what he regarded as the importance of "finality" in criminal justice. Mr. Godschalk had been identified by both victims, and was reported to have confessed details of the crimes to two detectives that could have been known only to the rapist. He had been convicted after full trial, and was, in the eyes of the law, guilty. Allowing him to continue to challenge his convic-

* Kenneth W. Gemmill Professor of Law, University of Pennsylvania Law School. This paper was delivered at the Powers and Pitfalls of Technology Symposium, held February 6, 2004, at New York University School of Law. It has benefited from the perceptive comments of Paul Robinson, David Rudovsky, and Chris Sanchirico, as well as the fine research assistance of Indraneel Sur and Mihir Kshirsagar. Each deserves my deep gratitude, but none bears any responsibility for mistakes that the paper retains.

1. The Innocence Project, established in 1992, is a pathbreaking clinic that handles cases in which "postconviction DNA testing of evidence can yield conclusive proof of innocence." *About this Innocence Project*, at <http://www.innocenceproject.org/about/index.php> (last visited Oct. 28, 2004). To date the Innocence Project's website lists 152 DNA exonerations. http://www.innocenceproject.org/case/display_cases.php (last visited Oct. 28, 2004).

tion, the argument went, was a disservice to the victims and to the criminal justice system.

Ultimately, we were forced to bring a Section 1983 action in federal court to compel access to the samples. With the aid of some creative legal analysis and a sympathetic trial judge, the samples were tested. They proved that the same man had in fact committed both rapes, and that man was not Bruce Godschalk.²

Our argument in the *Godschalk* case relied on both constitutional claims grounded in the right of meaningful access to courts³ and an extension of the doctrine of *Brady v. Maryland*,⁴ which obligates prosecutors to disclose exculpatory evidence before trial. It rested crucially on the proposition that DNA testing can serve as what both Peter Neufeld of the Innocence Project and Attorney General John Ashcroft have characterized as a kind of "truth machine."⁵ Whatever the limits of affirmative constitutional obligations imposed on courts and prosecutors to initiate review of convictions when newly discovered evidence emerges, we argued, the probative power of DNA evidence was such that a prosecutor could not legitimately stand in the way of a private effort to obtain evidence that could establish beyond doubt that a prior conviction

2. *Godschalk v. Montgomery County Dist. Attorney's Office*, 177 F. Supp. 2d 366 (E.D. Pa. 2001). I have previously described the case and explored the issues surrounding postconviction DNA testing in Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547 (2002).

3. *E.g.*, *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524–25 (2002) (recognizing constitutional importance of the right to seek redress of grievances); *Christopher v. Harbury*, 536 U.S. 403, 412–13, 415 n.12 (2002) (detailing constitutional roots of right of access); *Bounds v. Smith*, 430 U.S. 817, 821 (1977) ("It is now established beyond doubt that prisoners have a constitutional right of access to the courts."); *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) ("Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid."); *Johnson v. Avery*, 393 U.S. 483, 490 (1969) (invalidating rule of prison administration that forbade prisoners from assisting other prisoners in preparing petitions for postconviction relief).

4. 373 U.S. 83 (1963).

5. *Advancing Justice Through Forensic DNA Technology: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security, House Judiciary Comm.*, 108th Cong. 33 (2003) (statement of Peter J. Neufeld, Co-Director, Innocence Project) ("[F]orensic DNA operates as a truth machine with the power to convict the guilty and protect the innocent in a way that will improve dramatically the efficacy of the criminal justice system."); Attorney General John Ashcroft, News Conference on DNA Initiative ("DNA technology has proven itself to be the truth machine of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent"), at <http://www.usdoj.gov/ag/speeches/2002/030402newsconferncednainitiative.htm> (Mar. 4, 2002).

did not rest on a foundation of "factual guilt." It would stretch legal fiction beyond the breaking point to characterize a prisoner as scientifically innocent, but guilty in the eyes of the law. Nor can the state, consistent with the demands of the Constitution, continue to imprison an individual once his innocence has been so demonstrated. To the credit of our system of justice, the federal trial judge agreed, and once the testing had demonstrated Mr. Godschalk's innocence, the state courts freed him.

The story of Bruce Godschalk has replicated itself often enough around the country to raise questions about both the reliability of the criminal justice system and the priorities of some of our prosecutors. But in some ways, the story is one of a temporary transition. If Mr. Godschalk had been arrested after the mid-1990s, one of the first things police and prosecutors would have done is to seek to compare his DNA profile with that of the biological evidence left by the rapists. And if, as is the case with about a quarter of the prime suspects in sexual assault cases whose DNA is tested by the FBI laboratories every year,⁶ the results exonerated him, he would have been released.

Many district attorneys have undertaken efforts to evaluate evidence that might tend to exonerate currently incarcerated prisoners of their own accord,⁷ and many states have adopted statutory schemes that provide access to postconviction DNA testing.⁸ Innocence Projects around the country have continued to seek access to potentially exonerating DNA testing and pending federal legislation is likely to improve the situation still further.⁹ The combination of these initiatives means that the stock of prisoners who can be freed by first-generation DNA testing of biological evidence is probably dwindling.

6. *E.g.*, Peter Neufeld & Barry C. Scheck, *Commentary*, in EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL, at xxviii, xxviii (Nat'l Inst. of Justice Research Report No. NCJ 161258, 1996) (noting that DNA evidence has been routinely used in the investigative process of criminal cases, and has resulted in the clearance of prime suspects in twenty-five percent of sexual assault cases referred to the FBI since 1989 in which DNA results could be obtained), *available at* <http://www.ncjrs.org/pdf/dnaevid.pdf>.

7. *See* Kreimer & Rudovsky, *supra* note 2, at 557-60.

8. *E.g.*, DEP'T OF JUSTICE, ADVANCING JUSTICE THROUGH DNA TECHNOLOGY I (2003), *available at* http://www.usdoj.gov/ag/dnapolicybook_cov.htm.

9. Advancing Justice Through DNA Technology Act of 2003, H.R. 3214, 108th Cong. §§ 311-312 (2003) (providing procedures for federal postconviction DNA testing and authorizing grants of five million dollars annually to help states defray the costs of postconviction DNA testing).

As with any technological advance, however, the first generation of effects is not likely to be the last. In this essay, I will briefly review some legal issues that are likely to arise from the next generation of advances. Section I of this essay addresses challenges rooted in the promise of ever more accurate "truth machines" to identify unjust convictions. Civil libertarians like me will use these increases in potential accuracy to press the cases of alleged offenders who claim to have been wrongfully convicted. The window into the past provided by evolving technology will make it ever more difficult for a system that values justice to tolerate imprisonment of the innocent.

At the same time, the promise of epistemological certainty provided by DNA testing has a dark side for civil libertarians. Section II of the essay focuses on two troubling potential consequences. First, increased payoffs to DNA evidence generate increased pressure to collect that evidence from willing and unwilling subjects alike, pressure that is unlikely to be resisted effectively by current Fourth Amendment doctrine. Second, the ability to revisit the accuracy of criminal verdicts will put stress on traditional protections against double jeopardy. The former effect, I argue, is not without its redeeming virtues, for it will build a stronger hedge against miscarriages of justice. The latter, however, bears the seeds of real dangers, and I adumbrate a series of arguments that civil libertarians will need to advance to hold those dangers in check.

I. FREEING THE INNOCENT IN THE TWENTY-FIRST CENTURY

During the next decade we are likely to see at least a second wave of cases like that of Mr. Godschalk, for DNA technology continues to advance. Systems are currently becoming available that permit analysis of mitochondrial DNA, a substance that resists degradation more effectively than the cellular DNA that formed the basis for the first generation of tests and can be more easily recovered from hair and bone.¹⁰ Similarly, more sophisticated and sensitive methods of DNA analysis are beginning to be tested that can engage in DNA matching from ever smaller amounts of biological material. Laboratory reports have been released of effective DNA matches from the small amounts of skin cells contained in smudged

10. E.g., Michael P. Mayko, *New Tests for Older Crimes*, CONN. POST, Nov. 25, 2003.

latent finger or palm prints.¹¹ Indeed, in New York City, the Medical Examiner's office has recently established a plan to open a high-sensitivity DNA laboratory to test such evidence from nonviolent crime scenes.¹² These emerging developments mean that, just as the semen stains that could not be tested at Mr. Godschalk's initial trial became determinative evidence ten years later, a variety of formerly mute materials currently in evidence rooms—from murder weapons to masks to crime scene cigarette butts and fingerprints—could, in the next few years, conclusively inculcate or exonerate prisoners who are currently incarcerated.

In response to these developments, civil liberties advocates are likely to bring another wave of cases seeking to invoke the power of the DNA "truth machines." Advocates will, quite legitimately, demand preservation of evidence that might be tested in the future, as well as access to evidence that is newly probative.¹³ They will claim, with force, that access to potentially determinative laboratory tests should not be denied to prisoners who are indigent, lest the criminal justice system come to resemble (even more) the Civil War draft, in which only the poor were ultimately taken by the state. We are likely, as well, to see continued pressure on the Supreme Court's "actual innocence" jurisprudence,¹⁴ as advocates for prisoners exonerated by newly available evidence challenge the right of the state to rely on the outcome of earlier trials where the evidence was unavailable.¹⁵

11. E.g., M. Kinga Balogh et al., *STR Genotyping and mtDNA Sequencing of Latent Fingerprints on Paper*, 137 FORENSIC SCI. INT'L 188 (2003); Charles Choi, *DNA Extractable from Fingerprints*, UNITED PRESS INTERNATIONAL SCI. NEWS, July 31, 2003, available at <http://www.upi.com/view.cfm?StoryID=20030730-040600-4102r>.

12. Shaila K. Dewan, *As Police Extend Use of DNA, A Smudge Could Trap a Thief*, N.Y. TIMES, May 26, 2004, at A1 (reporting the plan to open a laboratory that can test "DNA samples previously considered too miniscule to collect, like skin cells left in a smudged fingerprint or a ski mask" and use of similar techniques in Miami).

13. As Justice Stevens has recently observed, many states have evolved constitutional doctrines in this regard that are more protective than those of the federal constitution. *Illinois v. Fisher*, 124 S.Ct. 1200, 1203 n.* (2004) (per curiam) (Stevens, J., concurring) (listing state courts that have decided that loss or destruction of evidence critical to the defense violates due process even without bad faith). For discussion of the duty to preserve evidence, see Kreimer & Rudovsky, *supra* note 2, at 585–87.

14. See *Schlup v. Delo*, 513 U.S. 298 (1995); *Herrera v. Collins*, 506 U.S. 390 (1993). For discussion of the interaction between exculpatory DNA evidence and the "actual innocence" jurisprudence, see Kreimer & Rudovsky, *supra* note 2, at 598–606.

15. See, e.g., *Cooper v. Woodford*, 357 F.3d 1054 (9th Cir. 2004) (granting stay of execution in part based on claim to use newly available tests of mitochondrial DNA evidence).

More pervasively, the justice system will be faced with the question of what to do with the over ninety percent of criminal cases that are resolved by plea bargains.¹⁶ Although plea bargaining rules require defendants to acknowledge guilt of the crimes to which they plead,¹⁷ the criminal justice system is haunted by the specter of defendants who, whether by fear, ignorance, or confusion, are induced to plead guilty to crimes they have not in fact committed. The prospect of newly probative DNA evidence may move this specter out of the shadows.¹⁸

In many situations, courts are understandably skeptical of post-plea claims of innocence. Such claims are easy to make, and, without the record of a prior trial, difficult to disprove. But newly probative DNA evidence offers the possibility of defendants who can demonstrate with scientific certainty that they are factually innocent of a crime to which they pleaded guilty, and in the case of a sufficient showing that they are "actually innocent," judicial reluctance to revisit plea agreements can sometimes be overcome.¹⁹ Assuming that a sufficient showing of actual innocence can become the predicate for overturning or withdrawing a plea agreement—or indeed that it could become the basis for a persuasive plea for clemency—courts will face the issue of whether a plea bargain can waive a defendant's interest in obtaining access in the future to information that could destroy the factual validity of the underlying guilty plea.²⁰ Many state statutes and proposed federal rules similarly authorize defendants to enter "knowing and voluntary" waivers of their statutory rights to prevent the destruction of evidence.

In its most recent analysis of the scope of rights waived by plea bargains, the Supreme Court in *United States v. Ruiz*²¹ confronted a defendant's due process claim that a guilty plea entered without

16. E.g., Corinna Barrett Lain, *Accuracy Where It Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 WASH. U.L.Q. 1, 1 n.2 (2002).

17. E.g., *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

18. See, e.g., Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004) (detailing false confessions and false plea bargains disclosed by DNA testing).

19. Cf. *Bousley v. United States*, 523 U.S. 614, 622 (1998) (determining that collateral attack on plea bargain may be premised on showing that one is "actually innocent").

20. See Daina Bortek, Note, *Pleas for DNA Testing: Why Lawmakers Should Amend State Postconviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429 (2004) (identifying cases in which defendants who had pled guilty were exonerated by DNA testing and arguing that statutes should be amended to allow access to evidence by defendants incarcerated as a result of a plea bargain).

21. 536 U.S. 622 (2002).

prosecutorial disclosure of "impeaching" material was not valid. The Supreme Court observed that due process analysis requires the court to consider "(1) the nature of the private interest at stake, but also (2) the value of the additional safeguard, and (3) the adverse impact of the requirement upon the Government's interests."²² Since the underlying plea agreement in *Ruiz* committed the government to disclosing any evidence establishing the factual innocence of the defendant, the Court found the waiver of access to impeachment evidence to be consistent with the demands of due process. The disclosure of substantively exculpatory evidence was adequate to diminish concerns that, in the absence of further disclosure, "innocent individuals, accused of crimes, will plead guilty."²³

In contrast, where the government denies postconviction access to the "truth machine" of potentially determinative DNA testing to those who have pleaded guilty, the possibility of miscarriage of justice is directly at issue. The risk of imprisoning the innocent should weigh heavily against the government in the due process balance, and those who are incarcerated pursuant to guilty pleas, like those who have been found guilty after trial, should be free to seek access to determinatively exculpatory evidence.

II.

CONSEQUENCES: THE DARK SIDE OF ACCURACY

The metaphor of the "truth machine" may take civil libertarians in unaccustomed directions, for the lure of "truth" is not easily cabined. A number of important structural aspects of our criminal justice system are designed not to maximize accuracy in adjudication but to minimize government misconduct.²⁴ The window into the past offered by DNA testing highlights the tradeoffs between these protections and the goal of accurately discerning guilt or innocence. I would like to spend a few moments exploring two of these collateral consequences of deploying the trope of DNA testing as "truth machine."

22. *Id.* at 631.

23. *Id.*

24. See Tom Stacy, *The Search For Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1374-85 (1991) (discussing the distinction between "truth impairing" rights, such as those "involving search and seizure law, confessions, the Double Jeopardy Clause, harmless constitutional error, and the scope of federal habeas corpus," and "truth furthering" rights).

A. DNA Databases

First, as its invocation by the Attorney General suggests, the metaphor of the "truth machine" is two edged: in Attorney General Ashcroft's terminology, DNA testing functions not only by "clearing the innocent," but also by "identifying the guilty."²⁵ The increasing probative power of DNA tests has led to an increased demand by law enforcement for access to DNA profiles of potential suspects. The larger the number of suspects with whom a DNA profile can be compared, the more effective the "truth machine" will be. And the more effective the truth machine, the more fervent will be the desire for its deployment.

In 1984, DNA identification matching was discovered by geneticist Alec Jefferys in the United Kingdom. Two years later, the police of Narborough, England, used DNA matching techniques to exonerate their prime suspect in the rape and murder of two teen-aged girls. But their search for "truth" did not end there. The Narborough officials sought, and obtained, "voluntary" blood samples from all 4000 adult males in the town and surrounding environs. As it turned out, the results did not identify the rapist, but it was later discovered that one of the local residents, Colin Pitchfork, had persuaded a friend to give a blood sample in his stead. Pitchfork was arrested, tested, and convicted as the murderer.²⁶

Over the last decade and a half, British law enforcement has continued to expand the scope of the DNA data kept available for potential matching. In 1995, Great Britain began a national collection of DNA profiles from individuals convicted of crimes, as well as some arrested for major offenses, a collection that currently contains profiles of two million individuals, or more than one of every thirty members of the entire British population.²⁷ New legislation, which authorizes the collection and maintenance of profiles from

25. Attorney General John Ashcroft, News Conference on DNA Initiative, *supra* note 5 ("DNA technology has proven itself to be the truth machine of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent."); *Justice Dept. Acts to Clear DNA Backlog*, MIAMI HERALD, Aug. 2, 2001, at 19A (quoting Attorney General Ashcroft as saying, "DNA technology can operate as a kind of truth machine, ensuring justice by identifying the guilty and clearing the innocent.").

26. Fred W. Drobner, Comment, *DNA Dragnets: Constitutional Aspects of Mass DNA Identification Testing*, 28 CAP. U. L. REV. 479, 479 (2000) (recounting the Colin Pitchfork saga).

27. Alan Travis, *Fears as DNA Database Passes 2m Mark*, THE GUARDIAN (Manchester), July 15, 2003, at 3; see Aaron P. Stevens, Note, *Arresting Crime: Expanding the Scope of DNA Databases in America*, 79 TEX. L. REV. 921, 944 (2001) ("The British database, begun in 1995, contains over 940,000 profiles and is expected to

all individuals who are arrested for crimes, will increase the number of samples.²⁸ The British database results annually in 21,000 "hits," and is credited with having linked suspects to an average of 15 murders, 31 rapes, and 770 car crimes per month last year.²⁹

In the United States, all fifty states have authorized the collection of DNA samples from convicted sex offenders.³⁰ Most also demand and index samples from those convicted of murder, kidnapping, and robbery; some states have begun to expand the sample set to include individuals who have been arrested but not convicted and those convicted of juvenile offenses.³¹ A federally supervised national database of convicted offenders, the "Combined DNA Index System" ("CODIS"), began operation in 1998 (the practice of requiring DNA samples from most federal offenders was established in 2000)³² and currently contains the profiles of over 1.4 million individuals.³³ Attorney General Ashcroft two years

soon encompass one-third of all males in the country between the ages of sixteen and thirty.").

28. Criminal Justice Act 2003, c. 44, § 10 (Eng.).

29. Travis, *supra* note 27.

30. Jeffrey S. Grand, Note, *The Bleeding of America: Privacy and the DNA Dragnet*, 23 CARDOZO L. REV. 2277, 2280 n.16 (2002).

31. E.g., National Conference of State Legislatures, State Laws on DNA Data Banks: Qualifying Offenses, Others Who Must Provide Sample (2003) (giving account of DNA databanking statutes in fifty states), available at <http://www.ncsl.org/programs/health/genetics/DNAoffenses.htm>; LA. REV. STAT. ANN. §§ 601–09 (West Supp. 2004) (authorizing collection and databanking of DNA samples of persons arrested for felonies or other specified offenses); TEX. GOV'T CODE ANN. § 411.1471(a)(1)–(2) (Vernon 1998 & Supp. 2004) (authorizing collection of DNA samples from persons indicted or arrested for one of a number of enumerated felonies); Jonathan Kimmelman, *Risking Ethical Insolvency: A Survey of Trends in Criminal DNA Databanking*, 28 J.L. MED. & ETHICS 209, 210, 219 (2000) (listing twenty-six states that include juvenile offenders); Rochelle L. Haller, Note, *The Innocence Protection Act: Why Federal Measures Requiring Postconviction DNA Testing and Preservation of Evidence are Needed in Order to Reduce the Risk of Wrongful Executions*, 18 N.Y.L. SCH. J. HUM. RTS. 101, 104 n.15 (2001) (indicating that twenty-six states collect juvenile information); Maria Glod, *Va. to Begin Taking DNA After Arrests For Felonies: Prosecutors, Rights Activists Split on Database Expansion*, WASH. POST, Jan. 1, 2003, at B1 (detailing Virginia's practices); News Release, California Secretary of State, Proposed Initiative Enters Circulation (describing a proposed California initiative that would require DNA samples of all individuals arrested for felonies), at http://www.ss.ca.gov/executive/press_releases/2004/04_013.pdf (Feb. 9, 2004).

32. United States v. Kincade, 345 F.3d 1095, 1097 (9th Cir. 2003), *vacated en banc* by 379 F.3d 813 (9th Cir. 2004).

33. Attorney General John Ashcroft, News Conference on President Bush's DNA Initiative, at <http://www.usdoj.gov/ag/speeches/2003/031102dnaremarks.htm> (Mar. 11, 2003).

ago announced a plan to increase the system's capacity from 1.5 million DNA profiles to 50 million DNA profiles, a goal that exceeds even the British system's aspiration,³⁴ and has floated proposals to include "suspected terrorists" and people associated with terrorist groups in the national database.³⁵ Currently pending legislation would allow the inclusion of all DNA information collected under authority of state law, including information from arrestees, juvenile offenders, and presumably medical records as well if the states choose to make them available.³⁶

In the United States, unlike in Great Britain, one might have expected that the Fourth Amendment would stand in the way of establishing or expanding DNA databases, or of genetic dragnets. But it is here that the metaphorical power of the "truth machine" preys upon the fragility of Fourth Amendment doctrine. A constitutional rule that prohibits "unreasonable" searches and seizures is unlikely, in the final analysis, to prevent the deployment of "truth machines." Who, after all, can claim it is "unreasonable" to seek information that will unerringly indict the guilty and free the innocent, particularly if the information obtained can be limited to "junk DNA" that serves only to truthfully identify perpetrators of crimes?³⁷

Involuntary collection of DNA blood samples is, to be sure, a "search" or "seizure" for purposes of the Fourth Amendment. But challenges to the involuntary collection of DNA profiles for inclusion in such databases have for the most part been unsuccessful.³⁸

34. Attorney General John Ashcroft, News Conference on DNA Initiative, *supra* note 5.

35. Dana Milbank, *President Asks for Expanded Patriot Act: Authority Sought To Fight Terror*, Sept. 11, 2003, WASH. POST, at A1; Nat Hentoff, *Ashcroft Out of Control*, VILL. VOICE, Mar. 5-11, 2003, at 29.

36. The pending federal Advancing Justice through DNA Technology Act would allow inclusion of any "persons whose DNA samples are collected under applicable legal authorities," except those "voluntarily" collected "for elimination." S. 1700, 108th Cong. § 103(a) (2003). Medical privacy statutes may impose some limits on which information may be provided without consent, *see infra* note 54, but states remain free to seek consent from patients.

37. *See, e.g.*, Akhil Reed Amar, *A Search for Justice in Our Genes*, N.Y. TIMES, May 7, 2002, at A31 (describing support for DNA testing legislation across the political spectrum and proposing that, to minimize the intrusion on privacy, legislation be limited to "so-called junk DNA—parts of the DNA code that identify individuals without revealing other medical facts").

38. For recent lists of cases upholding DNA extraction for databanks, *see, e.g.*, *United States v. Kincade*, 379 F.3d 813, 830-31 (9th Cir. 2004) (plurality opinion) (en banc), *Nicholas v. Goord*, No. 01 Civ. 7891, 2003 U.S. Dist. LEXIS 1621, at *24-26 (S.D.N.Y. Feb. 6, 2003), and *Stevens*, *supra* note 27, at 940 ("Challenges to

Such challenges have run aground on one of two theories. Some courts have relied on the doctrine that searches and seizures can be reasonable despite the absence of individualized suspicion, probable cause, or a warrant where "special needs" beyond the normal need for law enforcement exist.³⁹ As with warrantless and suspicionless blood and urine testing of railroad employees involved in major train accidents⁴⁰ or warrantless urine testing of certain customs employees,⁴¹ these courts have held that the acquisition of samples for DNA databases seeks not punishment but prophylaxis. Such acquisitions, it is argued, are not searches designed to lay the foundation for investigating and punishing the individuals from whom samples are taken, but rather are akin to administrative efforts to prevent future harm. Thus, they accord with the Fourth Amendment when their intrusion on privacy is "reasonable" in light of the public good served. Other courts have sustained the collection of samples from those who have been convicted of crimes on the basis of the diminished expectation of privacy that accompanies conviction and incarceration.⁴²

The single recent appellate exception is Judge Reinhardt's opinion in *United States v. Kincade*,⁴³ which, before being reversed by the Ninth Circuit en banc, found a violation of the Fourth Amendment in the federal requirement that parolees submit to blood extraction so that their DNA can be included in the national CODIS database. Judge Reinhardt's approach does not, I fear, pro-

convict-DNA-database statutes have been rejected in every jurisdiction where they have been brought, save [Massachusetts].").

39. *E.g.*, *Kincade*, 379 F.3d at 840 (Gould, J., concurring); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003); *Roe v. Marcotte*, 193 F.3d 72, 78–82 (2d Cir. 1999).

40. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989).

41. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

42. *E.g.*, *Kincade*, 379 F.3d at 833–36; *Velasquez v. Woods*, 329 F.3d 420 (5th Cir. 2003) (per curiam); *Shaffer v. Saffle*, 148 F.3d 1180, 1181 (10th Cir. 1998) ("[W]hile obtaining DNA samples implicates Fourth Amendment concerns, it is reasonable in light of an inmate's diminished privacy rights, the minimal intrusion involved, and the legitimate government interest in using DNA to investigate and prosecute crimes."); *Rise v. Oregon*, 59 F.3d 1556, 1560 (9th Cir. 1995) ("[Convicted felons] do not have the same expectations of privacy in their identifying genetic information that 'free persons' have."); *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992) ("With the person's loss of liberty upon arrest comes the loss of at least some, if not all, rights to personal privacy otherwise protected by the Fourth Amendment.").

43. *United States v. Kincade*, 345 F.3d 1095 (9th Cir. 2003), *vacated en banc by* 379 F.3d 813 (9th Cir. 2004).

vide much hope of constraining the expansion of the databases, for three reasons.

First, the trend of Supreme Court precedent is not auspicious. Judge Reinhardt's *Kincade* opinion found that the absence of any requirement of individualized suspicion rendered the sampling requirement unreasonable under the Fourth Amendment. It rejected the government's claim that the effort to establish a comprehensive national database was a "special need," accurately observing that two recent Supreme Court decisions place constraints on the application of the "special needs" doctrine. *City of Indianapolis v. Edmond*⁴⁴ held that although previous cases had determined that highway checkpoints established to test drivers for inebriation could invoke the "special need" to preserve public safety as a basis for suspicionless searches, highway checkpoints established to search cars for illegal drugs required probable cause. A "general interest in crime control" was not a special need justifying warrantless stops. Similarly, in *Ferguson v. City of Charleston*,⁴⁵ a public hospital tested pregnant women for drug use and then made available to the police the results of those tests if a woman tested positive twice. The Court acknowledged that one goal of the program was the preservation of the health of the women and their prospective children, but since "the immediate objective of the searches was to generate evidence for *law enforcement purposes*," the health goal did not establish a "special need" obviating the requirement of individualized suspicion.⁴⁶

Taken together, *Ferguson* and *Edmond* lend support to the proposition that the "law enforcement purpose" of DNA databanks requires that sampling be conducted only on the basis of individualized suspicion. Unfortunately, the Supreme Court's most recent analysis, *Illinois v. Lidster*,⁴⁷ once again abandons the requirement of individualized suspicion and compares "the gravity of the public concerns served by seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty" in evaluating highway checkpoints seeking

44. 531 U.S. 32 (2000).

45. 532 U.S. 67 (2001).

46. *Id.* at 83–84.

47. 124 S.Ct. 885 (2004). The majority in *Lidster* determined that "unlike *Edmond*, the context here (seeking information from the public) is one in which, by definition, the concept of individualized suspicion has little role to play. Like certain other forms of police activity, say, crowd control or public safety, an information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual." *Id.* at 889.

information from motorists.⁴⁸ This bodes ill for the opponents of sampling; those who seek to deploy the "truth machine" can rely on the gravest of public concerns, and where the state invokes a desire to deter future crimes or exonerate future innocents, only a little doctrinal manipulation is necessary to distinguish the effort to apprehend current or past violators in *Edmond* and *Ferguson*. Indeed, *Kincade* has been rejected by two other circuits,⁴⁹ and the Ninth Circuit reversed the decision on en banc review.⁵⁰

Second, Judge Reinhardt's opinion in *Kincade* relies on the physical intrusiveness of the blood sample required of probationers, which "necessitate[s] penetrating the skin," to distinguish the blood sample from the fingerprinting of parolees that it acknowledges as constitutional.⁵¹ Even if Judge Reinhardt's theory finds favor in another court, it is far from clear that the more modern technique of buccal swab collection would be unconstitutional. The reasoning seems entirely inapplicable to such emerging collection mechanisms as fingerprints or hair samples. It would, therefore, hardly impede the collection of DNA profiles in the emerging technological environment.⁵²

48. *Id.* at 890 (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979)).

49. *Groceman v. U.S. Dep't of Justice*, 354 F.3d 411, 413 (5th Cir. 2004); *United States v. Plotts*, 347 F.3d 873, 877 (10th Cir. 2003); see also *Green v. Berge*, 354 F.3d 675, 681 (7th Cir. 2004) (Easterbrook, J., concurring) (rejecting *Kincade* as to probationers but suggesting that testing of the population as a whole would differ).

50. *Kincade*, 379 F.3d 813. In reversing by a vote of 6-5, the en banc panel manifested the unsettled nature of the area. The six-member majority could not coalesce around a single theory of decision, and both Judge O'Scannlain's five-member plurality and Judge Gould's concurrence emphasized that the decision resolved only the issue of testing and databanking the DNA of individuals who were on parole or supervised release. The decision was taken over separate spirited dissents filed by Judges Reinhardt, Kozinski, and Hawkins.

51. 345 F.3d at 1100.

52. Judge Kozinski's dissent in *Kincade* recognizes that

we can't go anywhere or do much of anything without leaving a bread-crumb trail of identifying DNA matter. If we have no legitimate expectation of privacy in such bodily material, what possible impediment can there be to having the government collect what we leave behind, extract its DNA signature and enhance CODIS to include everyone?

Kincade, 379 F.3d at 873 (Kozinski, J., dissenting). His analysis would find that "the Fourth Amendment intrusion here is not primarily the taking of the blood, but seizure of the DNA fingerprint and its inclusion in a searchable database." *Id.* Judge Kozinski acknowledges, however, that this approach is at odds with settled analyses of the use of fingerprints. *Id.* A serious effort to implement it would require the courts to recast a broad swath of constitutional doctrine reducing or limiting the ability of government to search its own files and files held by others. E.g., *Smith v. Maryland*, 442 U.S. 735, 744-46 (1979) (concluding that "pen regis-

Third, and most importantly, expansions of DNA databases are likely to continue with the addition of samples whose provenance cannot be subjected to Fourth Amendment challenge. Samples legitimately collected in the course of initial criminal investigations or arrests where probable cause is present for other crimes cannot be quarantined once they are in the hands of law enforcement agencies. Samples collected by government for other purposes may also be subject to subsequent inclusion in national databases. Thus, the U.S. military currently holds DNA profiles of over three million current and former servicemen,⁵³ and medical records increasingly will make reference to DNA structures. As long as there is "consent" to the initial collection of information, there are limits to the Fourth Amendment objections that can be raised to further dissemination of those records.⁵⁴

ter" does not require warrant, since telephone numbers are disclosed to telephone company); *Whalen v. Roe*, 429 U.S. 589, 603-04 (1977) (holding that neither the immediate nor the threatened impact of the patient-identification requirements and databanks on either the reputation or the independence of patients for whom certain drugs are medically indicated is sufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment); *United States v. Miller*, 425 U.S. 435, 442-43 (1976) (holding that depositor has no legitimate expectation of privacy in bank records); *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 54 (1974) (finding that required maintenance of bank records does not violate Fourth Amendment). I would applaud such a development, but I am skeptical as to its likelihood under the current Court.

53. Patricia A. Ham, *An Army of Suspects: The History and Constitutionality of the U.S. Military's DNA Repository and Its Access for Law Enforcement Purposes*, *ARMY LAW.*, July-Aug. 2003, at 1, 1.

54. Statutory protections of medical privacy may provide some hedge against this development, e.g., Dep't of Health and Human Servs., *Questions and Answers, May covered entities disclose protected health information to law enforcement officials?*, at http://answers.hhs.gov/cgi-bin/hhs.cfg/php/enduser/std_alp.php (last modified July 26, 2004) (setting forth limits on dissemination of health information, but indicating that information can be freely disseminated for national security purposes, to "respond to an administrative request," or "[t]o a law enforcement official [sic] reasonably able to prevent or lessen a serious and imminent threat to the health or safety of an individual or the public"). But in the absence of a constitutional underpinning, one suspects that such protections will deform quickly under the impact of the demands for the "truth machine."

Similarly, DNA dragnets as executed throughout the country have relied on "consent" to validate suspicionless DNA sampling. The police present recalcitrant citizens with the Hobson's choice of "voluntarily" submitting to DNA sampling or becoming targets for focused investigation or (according to allegations) public identification. See Richard Willing, *Privacy Issue is the Catch for Police DNA Dragnets*, *USA TODAY*, Sept. 16, 1998, at 1A (recounting the use of dragnets in Prince George's County, MD; San Diego; Miami; and Ann Arbor, MI); Jack Leonard, *Using DNA to Trawl for Killers*, *L.A. TIMES*, Mar. 10, 2001, at A1 (describing "genetic dragnets" across the country, including a search in Costa Mesa, CA, in which 188

The conventional libertarian response to this state of affairs is to bemoan the flaccid quality of Fourth Amendment doctrine and to call for a renewal of commitment to privacy in the face of technological encroachment. I confess I have some attraction to this convention, but, having argued for the social importance of DNA testing as a truth machine, the conventional response comes at a price: each excluded DNA profile not only reduces the probability that a guilty person will be convicted of a crime (or a potential offender deterred), but reduces as well the probability that an innocent person will go free. After all, one of the emerging uses of DNA testing (as in the Central Park jogger case) is to establish a suspect's innocence by showing that the crime in question was committed by another.⁵⁵

Equally important, those already involved with the criminal justice system will inevitably be part of the national database. Given this, there is a civil libertarian argument for expanding the database still further. If databases are limited to those who have been convicted of crimes, given the current biases of our criminal justice system, this will be a pool of potential suspects for future criminal investigation (in crimes ranging from murder to car theft) that is disproportionately comprised of members of minority communities. This result, in turn, means two things. First, it means that the bias of future investigations will be exacerbated. It is always easier to focus on a pool of suspects as to whom data is plentiful; if that pool is current suspects and previous offenders, future convictions will come even more extensively from that pool. Second, it means that political pressure to control the collateral use of criminal justice databases will narrow. Misuse of a database that includes only the dispossessed will be of relatively little concern to the complacent majority. As a second-best solution, the force of the "truth machine" may drive civil libertarians to support universal DNA databanks.

"voluntary" mouth swab samples were taken from persons who frequented the same environs as murder victim Sunny Sudweeks; a search in Miami, where police tested 2300 men "along a trail where the bodies of six prostitutes had been dumped;" and searches in Lawrence, MA, and the Bronx); Keith O'Brien, *Men Seek Return of DNA from Serial Killer Search*, TIMES-PICAYUNE, Dec. 28, 2003, at A-1 (Baton Rouge police obtained 1200 mouth swab samples in search for serial killer).

55. Jim Dwyer, *Verdict that Failed the Test of Time*, N.Y. TIMES, Dec. 6, 2002, at A1 (recounting exoneration of teenagers convicted of raping a jogger in Central Park after the confession of another prisoner was supported by DNA evidence).

B. *Double Jeopardy*

Finally, let me turn to a second ominous consequence of the deployment of the “DNA as truth machine” trope. In *Godschalk*, as in many cases of DNA exoneration, one of the objections raised to our efforts on Mr. Godschalk’s behalf was that “finality” is a value in the criminal justice system—that having proved the case against Mr. Godschalk beyond a reasonable doubt, neither prosecutors nor victims should be vexed by the necessity of revisiting a painful set of circumstances. Our response, quite legitimate in my view, was to deny that “finality” should override the claims of “factual justice” as established by DNA.

In the last two years there has been a disquieting inversion of this argument in both the United Kingdom and Australia. In both countries proposals have been put forward that individuals who have been acquitted of crimes should be subjected to subsequent prosecution when the state adduces new and determinative evidence of guilt.⁵⁶ Doctrines of double jeopardy, so the argument goes, were formed in an era before the availability of the “truth machine” of DNA. Just as verdicts of guilty should not be allowed to stand in the face of a showing of factual innocence, erroneous verdicts of innocent should give way before a scientific showing of “factual guilt.”

Lest you believe that these arguments are phantoms conjured up by an excessively imaginative law professor, I direct your attention to the British Criminal Justice Act of 2003, which, in addition to authorizing involuntary DNA sampling of all arrestees, also provides that the Court of Appeals may order the retrial of a person convicted of murder, rape, kidnapping, drug offenses, or terrorism where there is “new and compelling evidence against the acquitted person.”⁵⁷

The British, lacking a written constitution, are free to eliminate double jeopardy protections by legislation. An effort to transfer such an approach to the United States would face constitutional barriers, for the United States, unlike the Great Britain, entrenches our prohibitions against double jeopardy in both federal and state

56. Paul Roberts, *Double Jeopardy Law Reform: A Criminal Justice Commentary*, 65 MOD. L. REV. 393 (2002) (discussing and critiquing development of British proposal); Michael Kirby, *Carroll, Double Jeopardy and International Human Rights Law*, 27 CRIM. L. J. 231, 238–45 (2003) (discussing and critiquing Australian campaign to lift double jeopardy bar). A similar proposal was recently rejected in New Zealand. NEW ZEALAND LAW COMMISSION, ACQUITTAL FOLLOWING PERVERSION OF THE COURSE OF JUSTICE (Law Commission Report No. 70, 2001).

57. Criminal Justice Act 2003, c. 44, §§ 75–97 (Eng.).

constitutions. The classic statement, repeated regularly by the Court, is Justice Black's formulation that the double jeopardy protection guards against prosecutorial abuse:

[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.⁵⁸

Yet contemporary double jeopardy doctrine seems flexible enough to allow a variety of gambits for the state or federal government to deploy newly obtained evidence, particularly if statutes of limitations are tolled by the emergence of new DNA testing mechanisms.⁵⁹ Double jeopardy, the Court has held, bars only re-prosecution by the same sovereign. Thus, where the same conduct violates both state and federal law (as, for example, in the case of drug possession), "dual sovereignty" theory will allow a second prosecution in federal court for state crimes or vice versa.⁶⁰ Similarly, the Supreme Court has held that double jeopardy does not bar the state from introducing evidence of criminal acts of which a defendant

58. *Green v. United States*, 355 U.S. 184, 187–88 (1957). See *Monge v. California*, 524 U.S. 721, 732 (1998) (citing *Green* in support of the proposition that the "need for reliability accords with one of the central concerns animating the constitutional prohibition against double jeopardy").

59. For a recent list of pending proposals to toll or eliminate statutes of limitations, see Smith Alling Lane, 2003 Statute of Limitations Legislation, at <http://www.dnaresource.com/2003%20Statute%20of%20Limitations%20Legislation.pdf> (last visited November 2, 2004). For new legislation, see National Conference of State Legislatures, State Legislation on Statute Of Limitations for Certain Sex Offenses and Identifying Perpetrators by DNA Profiles, at <http://www.ncsl.org/programs/health/genetics/dnasexoffen.htm> (last visited Nov. 2, 2004). The pending federal Advancing Justice through DNA Technology Act would allow statutes of limitations to run from the time when DNA evidence "implicates a person," rather than the time of the offense's commission. S. 1700, 108th Cong. § 104.

Even without statutory changes, indictments of "DNA profiles" may effectively toll the statute of limitations. See e.g., Meredith A. Bieber, Comment, *Meeting the Statute or Beating It: Using "John Doe" Indictments Based on DNA to Meet the Statute of Limitations*, 150 U. PA. L. REV. 1079 (2002).

60. *Bartkus v. Illinois*, 359 U.S. 121, 122–24 (1959) (state prosecution following federal prosecution was not double jeopardy); *Abbate v. United States*, 359 U.S. 187, 195–96 (1959) (federal prosecution following state prosecution did not violate double jeopardy protections); *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (successive prosecutions in different states did not violate double jeopardy protections).

has been acquitted at sentencing for other subsequent crimes;⁶¹ a fortiori newly available DNA evidence could be admissible to augment sentences for other crimes. So, too, in cases where a defendant has pleaded guilty to a lesser offense, the state may take the position that subsequent prosecution on a cognate charge is not barred because "jeopardy" has never attached.⁶² A generous construction of the protections against double jeopardy could stymie these approaches, but the hydraulic pressure exerted by the "truth machine," if unopposed, is likely to incline courts away from extending protection, and indeed could induce courts to carve new exceptions to the double jeopardy guaranty.

To the extent that the double jeopardy guaranty is an effort to avoid "the possibility that even though innocent, a defendant may be found guilty," the "truth machine" of DNA counts against protection of the accused rather than for it. As the British argument goes, the second trial will be one where the "guilty" will be found "guilty." To be sure, opponents of DNA-based retrials can distinguish their own attacks on "finality" on the ground that freeing the innocent convict is a more pressing social obligation than convicting the guilty acquittee. To fully meet the claims of the "truth machine," however, requires more than this distinction. I suspect that civil libertarians will find ourselves deploying three sorts of arguments, all of which rely on values in tension with the vision of the criminal justice system as exclusively concerned with truth.

The first argument would recognize that an effort to explore the "truth" of an acquittal risks undercutting the function of the

61. *United States v. Watts*, 519 U.S. 148 (1997) (per curiam) (holding that double jeopardy prohibition does not bar sentence enhancement based on acts related to crimes of which defendant was acquitted); *Dowling v. United States*, 493 U.S. 342, 349 (1990) ("[A]n acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.").

The impact of the extension of Sixth Amendment protections to certain sentence enhancements in *Blakely v. Washington*, 124 S.Ct. 2531 (2004), on this line of cases has yet to be determined. Compare, e.g., *Blakely* at 2561-62 (Breyer, J., dissenting) (raising as an open question whether "the numerous cases of this Court holding that a sentencing judge may consider virtually any reliable information [remain] good law"), with, e.g., *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004) (holding that *Blakely* did not apply to bar sentence enhancement under federal guidelines on the basis of a judicial determination unauthorized by the jury verdict).

62. See generally Daniel C. Richman, *Bargaining About Future Jeopardy*, 49 VAND. L. REV. 1181 (1996) (describing the systemic effects of "minimalist" double jeopardy doctrine that may not protect defendants who plead guilty against future prosecution for closely related crimes).

jury as the conscience of the community. Since it can never be clear whether an acquittal rested on a failure of proof of "factual guilt," a failure of persuasion of "legal guilt," or jury nullification, new evidence can never be shown to be determinatively inculpatory.⁶³

Second—at least in the case of prior acquittals—we can argue that failure to accord finality to not-guilty verdicts effectively eviscerates an important check on prosecutorial malice or politically charged prosecutions. A prosecutor who cannot deploy newly discovered evidence is less likely to spend time obsessively searching for it; by contrast, an aspiring Inspector Javert unconstrained by double jeopardy could use the search for new evidence as an occasion to persecute a target indefinitely. We should remember that in the aftermath of the Kennedy assassination, New Orleans District Attorney James Garrison's conspiracy theory led him to efforts to re-prosecute Clay Shaw after acquittal, supported by an organization that went by the name "Truth or Consequences."⁶⁴

Third, as the penetrating power of state surveillance and scientific testing that can reconstruct the past continues to increase, the necessity of respect for the "constructed" truth of trial justice becomes more and more important as a constraint on government power. The promise of the "truth machine" is also its danger. If the government is entitled to "do-overs" in the criminal justice system, prosecutorial discretion will effectively come to supplant the trial as the method of apportioning criminal punishment. In a world where scientific advances continually allow the government to discover more about the past, the situation of citizens will increasingly come to resemble that of drivers facing traffic police. Just as a sufficiently diligent policeman can almost always discover a traffic violation for which to stop any given driver, an increasingly omniscient state, if unconstrained by statutes of limitations or double jeopardy, will ultimately find itself in a position to prosecute almost anyone who falls short of sainthood. The underlying danger, as Justice Jackson observed in a related context, is that the administration of the criminal justice system "will have enough on

63. Commentators have long argued that the strongest defense of double jeopardy doctrine lies in its protections of jury nullification. See, e.g., Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 129-32.

64. *Robertson v. Wegmann*, 436 U.S. 584, 586 (1978).

enough people, even if it does not elect to prosecute them, so that it will find no opposition to its policies."⁶⁵

CONCLUSION

The approach of some courts and prosecutors to the question of innocence in the criminal justice system reads as if they subscribe to postmodern concepts of socially constructed reality: once the criminal justice process has run its course, a convicted defendant becomes "guilty" in the eyes of the law, and that guilt is impervious to subsequent factual disproof. By contrast, the presuppositions of civil libertarians like me are resolutely pre-postmodern; we write under the assumption that the identity of the perpetrator of a crime is a "real" fact, and that continuing to punish an individual on the ground that he is the perpetrator when that proposition is scientifically false is "really" unjust. We claim that DNA exonerations are a more reliable guide to truth than a jury verdict or a guilty plea. We invoke the power of the "truth machine." These claims will continue to echo in the next decade as DNA testing advances.

Yet the allure of accuracy has its costs. It exists in tension with aspects of the criminal justice system that seek to protect against invasions of privacy and governmental oppression. The arguments for "real" guilt and innocence can be deployed to incarcerate as well as to free and the challenge for civil libertarians in the twenty-first century will be to acknowledge those tensions, while building the arguments that will stand as bulwarks against abuse.

65. ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 71 (1955).